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VIA FAX

TO: ALL FLORIDA AGENTS

FROM: SCOTT PIERCE
Senior Vice President & Florida State Manager

DATE: JANUARY 24, 2000

SUBJECT: COMPETITIVE PRACTICES

It has come to our attention that some agents are offering to pay Realtors a fee for filling out what appears to amount to an order-processing form when placing a title order. This form, which consists of multiple pages, requests various blanks to be filled in with information regarding the real estate transaction such as sales price, legal description, deposit information, details regarding the sellers, buyers, and lender, etc. We also understand that an additional payment is also being offered for a prior title policy when it accompanies the form.

After discovering this practice, we brought it to the attention of the Department of Insurance. The Department indicated that this type of program does not violate the statutes, rules, or regulations in the state of Florida. The Department went on to state that, in its opinion, this practice might be allowed under RESPA if certain conditions are met. Recognizing that many of your customers are Realtors, we contacted the chief of the Orlando Bureau of Enforcement of the Florida Real Estate Commission (FREC) and found that they have concerns about this type of program.

It is discouraging to see such practices develop within the industry as they merely succeed in further eroding an already existing thin profit margin for agents. We hope that the Department will reconsider its opinion on this practice.

SP/pm



February 28, 2000

James R. Mitchell, Esq.
Assistant Attorney General
Counsel for the Florida Real Estate Commission
Office of the Attorney General - Real Estate Bureau
135 West Central Blvd., Suite 1150
Orlando, Florida 32801

Re: Rule 61J2-10.028, Florida Administrative Code

Dear Mr. Mitchell:

Thank you for your letter of January 28, 2000 regarding the referenced provision of the Administrative Code.

As you know, the title insurance industry has been having some rather significant difficulty with the explosion of the practice of real estate licensees under *Chapter 475, Florida Statutes* seeking payments as independent contractors for the completion of an order sheet for the closing agent. Fees for this practice have mushroomed. In some instances the fee solicited or paid is as high as \$400.00, and the practice has spread rapidly across the state of Florida. A copy of one type program is attached.

I appreciate your reluctance to comment on either HUD or Department of Insurance statutes or regulations. I had hoped, however, that you might elaborate more with regard to the referenced section of the administrative code that would appear to require disclosure. The problem is one of interpretation of this rule. Does the payment of a fee by a closing agent to a real estate broker/salesperson for the completion of an order sheet constitute a "kickback" or "rebate" under the cited rule such that disclosure is required? Further, doesn't *Sec. 475.278, F.S.* require disclosure and "accounting for all funds" as part of the broad dictate for "dealing honestly and fairly" with the customer?

You should be aware before you answer this question that the real estate licensee apparently gets an IRS Form 1099 from the title insurance agency as would any other independent contractor. However, the real estate licensee does very little for the monies. In fact most of the information provided is a reiteration of information contained in the contract. It is merely a function of information collection and transfer that one can reasonably assert was already agreed to be performed under an ordinary buyer, seller, or transactional listing agreement. The cost of this "service fee" is passed on to the consumer by way of higher closing or related title fees. This is patently wrong, and anti-consumer.

James R. Mitchell, Esq.
February 28, 2000
Page 2

It is my hope that you will investigate this practice and conclude that a written disclosure is required under *Rule 61J2-10.028, F.A.C.* for any and all fees received by an agent or broker in the course of a transaction. This appears to be the proper interpretation of *Sec. 475.278, F.S.* notwithstanding whether such payments constitute a "kickback" under the referenced rule. It is my further hope that you would publish your opinion in the next FAR newsletter for the protection of your licensees.

Thank you for your continued interest and consideration of these very important issues.

Sincerely,

Scott Pierce
Senior Vice President

SP/cmw
Enclosure



OFFICE OF THE ATTORNEY GENERAL

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ROBERT A. BUTTERWORTH
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Reply to:

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March 2, 2000

Mr. Scott Pierce
Old Republic National Title
Insurance Company
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100 South Ashley Drive
Tampa, Florida 33602-5300

Dear Mr. Pierce:

Thank you for your letter of February 28, 2000.

In response to your questions regarding Rule 61J2-10.028, Florida Administrative Code, it is my opinion that the payment of a fee by a closing agent to the real estate licensee for the completion of an order sheet would constitute a "kickback" per the rule. Therefore, disclosure of such kickback would be required. The fact a 1099 is issued does not change my opinion.

However, it is also my opinion that s.475.278, Fla. Stat., regarding the accounting for all funds does not also require disclosure. This provision pertains to funds entrusted to the licensee from one of the parties to the transaction. It does not encompass third party fees paid to the licensee.

Your suggestion that this topic be part of my column in the Florida Real Estate Commission News & Report is a good one and I will endeavor to cover it in the near future.

Be advised the above is my opinion only and is not to be considered an opinion of the Attorney General.

Sincerely,

James R. Mitchell
Assistant Attorney General
Counsel for the Florida Real
Estate Commission

JRM:jk